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JOSEPH F. SPANIOL, JR
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NO. 89-301

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

JOHN MONROE, ET AL

APPELLANTS

V.

CITY OF WOODVILLE
MISSISSIPPI, ET AL

APPELLEES

ON APPEAL FROM A THREE-JUDGE DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Carroll Rhodes*
P. O. Box 588
Hazlehurst, MS 39083
(601) 894-4323

Deborah A. McDonald
Southwest MS Legal Services
P. O. Box 1242
McComb, MS 39648
(601) 684-0578

Willie L. Rose
1542 Fairwood Street
Jackson, MS 39213
(601)957-1935

October 2, 1989

QUESTIONS RAISED BY APPELLEES

1. Did the fact that no candidate qualified for a regularly scheduled town marshall election between 1977 and 1989 relieve the Town of Woodville, Mississippi of its obligation to seek Section 5 review of its failure to hold special elections for the vacant position?

2. Is a voting rights action moot when more than 8 months after the action is filed, a covered jurisdiction seeks and obtains preclearance of the challenged voting change while a claim for an award of attorney fees is still pending?

ARGUMENT I

THIS § 5 VOTING RIGHTS CASE PRESENTS A SUBSTANTIAL QUESTION.

Appellees argue, in their Motion to Dismiss or Affirm, that a substantial question is not presented for review because: (1) there was a lack of interest in the town marshall position by the voters and (2) the position paid only $50.00 per month. (Motion to Dismiss or Affirm, pp. 2-3). That argument is specious. Three black voters filed the Section 5 action on March 8, 1988 because the town had abolished elections for the marshall position in 1977. (Juris. Stat. pp. 3-4). They did not qualify to run in regularly scheduled elections[1] not because of a lack of interest but because elections for the position had been abolished.[2] (Juris. Stat., App. E-16 through E-11).

Appellees state that appellants are raising the failure to call special elections for town marshall for the first time in their Jurisdictional Statement. (Motion to

[1]Appellees cite District Judge Barbour's exchange with appellants' attorney Willie Rose (sic) wherein the Judge said, "[I]n this instance nobody had qualified" for the position. (Motion to Dismiss or Affirm, p. 3) to support their contention that there was a lack of interest in *all* town marshall elections. However, a careful reading of the colloquy reveals that Judge Barbour was referring to regularly scheduled elections held every four years. (Juris. Stat., App. E-16 through E-18, and E-8 through E-12). Regularly scheduled elections are held during the same time period every four years. As Judge Barbour noted, a voter interested in a position would know when to qualify for the position when election time nears, provided the position has not been abolished.

On the other hand, a voter would not know when special elections to fill vacancies are held without the city governing authority calling the special election. Section 23-15-857, Miss. Code Ann. (Supp. 1988); (Juris. Stat., App. E-8 through E-12). The town's governing authority was required by state law and past practices to call a special election to fill the vacant town marshall position. (Juris. Stat., App. E-8 through E-12); *State ex rel Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908); Section 23-15-857, Miss. Code Ann. (Supp. 1988) Appellants argue this failure to call special elections is a voting change.

[2]Elections for the position were abolished in 1977. (Juris. Stat. 3-4)

Dismiss or Affirm, pp. 3-4) That is not true. Appellants raised this issue in their complaint, supplemental brief, and in oral argument. See (Juris. Stat., App. E-8 through E-12). More importantly, the court below considered appellants' argument on this point and summarily rejected them. (Juris. Stat., App. E-8 through E-12). Therefore, the questions presented for review by appellants are properly before the court.

Appellees also argue, without citing authority, that a substantial question is not presented in this appeal because the town marshall position pays only $50.00 per month. However, in *Hathorn v. Lovorn,* this court considered Section 5 issues involving school district trustees in Mississippi. *Hathorn v. Lovorn*, 457 U.S. (1982). School district trustees are not paid a salary, but given a per diem allowance and reimbursed for expenses and mileage. Section 37-6-13, Miss. Code Ann. (Supp. 1988); Section 37-7-235, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 492, Section 45; Section 37-5-21, Miss. Code Ann. (1972), repealed by Laws, 1986, Ch. 492, § 44.

Next, appellees argue that Section 5 is implicated only by affirmative governmental action. (Motion to Dismiss or Affirm, pp. 4-5). However, Section 5 is not so limited. If a political subdivision is required to act within a certain time, and has done so in the past, failure to act within the prescribed time can constitute a change in voting. "Indeed, if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining" to act as they had done so in similar situations in the past. *Hathorn v. Lovorn, Supra* at 265 n. 16.

ARGUMENT II

A VOTING RIGHTS CASE IS NOT MOOT WHERE THE CLAIM FOR ATTORNEY FEES IS STILL PENDING?

Appellees' reliance upon *Berry v. Doles*, 438 U. S. 190, to make its case for mootness is misplaced. That

case involved a finding by the District Court of a violation of Section 5 but there was a refusal by the District Court to allow a remedy for the past violation. This court, subsequently, reversed that holding.

The present case is one where appellees failed to seek § 5 preclearance abolishing the town marshall position for twelve (12) years, his duties being assigned to the police chief. Eight months after this action was filed, appellees sought preclearance. Appellees suggest that appellants must obtain a declaratory judgment in order to be considered prevailing parties for purposes of having a presently existing claim. The claim which presently exists is one for attorney fees and thus this action is not moot. This court recently has held in *Hewitt v. Helms*, 482 U. S. 755, 761, 762:

> "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e. g., a monetary settlement or a *change in conduct that redresses the plaintiff's grievances*. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher, Supra,* at 129, 65 L. Ed. 2d 653, 100 S. Ct. 2570. . . Redress is sought through the court, but from the defendant.

The court went on to state that. . . "if the defendant under the pressure of a lawsuit alters his conduct towards the plaintiff, the plaintiff will have prevailed. Id. at 761.

The salient fact concerning this entire controversy is the fact that for twelve (12) years, appellees failed to obtain preclearance with respect to the town marshall position but that after this lawsuit was filed preclearance was then requested i.e. appellees altered their conduct under the pressure of this instant action.

CONCLUSION

The questions presented by appellants are substantial and this court should deny appellees' Motion to Dismiss or Affirm and note probable jurisdiction and reverse the three-judge panel.

Respectfully submitted,

CARROLL RHODES
P. O. BOX 588
HAZLEHURST, MS 39083
(601) 894-4323

DEBORAH A. MCDONALD
SOUTHWEST MS LEGAL SERVICES
P. O. BOX 1242
MCCOMB, MS 39648
(601) 684-0578

WILLIE L. ROSE
1542 FAIRWOOD STREET
JACKSON, MS 39213
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ATTORNEY FOR APPELLANTS